

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

FILED  
U.S. DISTRICT COURT  
DISTRICT OF KANSAS  
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UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil No. 89-2400-0 - CM

WINCO FIREWORKS INC., and  
DAVID COLLAR,

Defendants.

RALPH L. DELOACH  
CLERK  
BY mkmt DEPUTY  
AT KANSAS CITY, KS

MODIFIED CONSENT DECREE OF PERMANENT INJUNCTION  
AND FOR PAYMENT OF CIVIL PENALTIES

On March 6, 1990, this Court entered a Consent Decree of Permanent Injunction ("Consent Decree") against WINCO FIREWORKS, INC., a corporation, and DAVID COLLAR, an individual, for relief against Defendants under the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. § 1261 et seq., and the regulations issued thereunder. Plaintiff and Defendants now have agreed to the present Modified Consent Decree of Permanent Injunction and for Payment of Civil Penalties ("Modified Decree") which supersedes the original Consent Decree in this case. Plaintiff has also agreed not to file a motion for an order to show cause why Defendants or Related Persons, (as defined in paragraph 2 of this Modified Decree), should not be held in contempt based upon conduct through and including June 27, 2005. Based upon this Modified Decree, Plaintiff also has agreed not to file a complaint, or initiate criminal or other enforcement proceedings, alleging violations by Defendants or Related Persons of the FHSA during the five years preceding the entry of this Modified Decree, as well as violations of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2051 et seq. Accordingly, based upon this Modified Decree, neither Plaintiff nor the United States Consumer Product Safety Commission

("CPSC") will seek any additional penalties, civil or criminal, or initiate any further enforcement proceedings, against Defendants or Related Persons, based upon the violations alleged in CPSC's letter by Dennis Kacoyanis, dated September 13, 2004, to Robin E. Scully. Defendants have consented to the entry of this Modified Decree in settlement of the contemplated motion to show cause and contemplated complaint, without admitting that they were ever in contempt of the Consent Decree or in violation of the FHSA or CPSA.

THEREFORE, on the joint motion of the parties, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. This Court has jurisdiction over the matter pursuant to 28 U.S.C. §§ 1331, 1337, and 1345 and has personal jurisdiction over the Defendants and the Related Persons. Venue in this District is based on 28 U.S.C. §§ 1391 (b) and (c).

#### **I. DEFINITIONS**

2. For purposes of this Modified Decree, the following terms have the following meanings:

A. "Defendants" are Winco Fireworks, Inc., a corporation, and David Collar, an individual.

B. "Related Persons," for purposes of this Modified Decree only in order to reach a settlement of this overall matter, includes but is not limited to Michael Collar, John Collar, Winco Fireworks International, LLC, Winco Fireworks of Utah, LLC, and Zenith Specialties, Inc. In addition, "Related Persons" includes each and all of Defendants' directors, officers, agents, representatives, employees, assigns, and any or all persons in active concert or participation with any of them, and having anything to do with the import, assembly,

manufacture, sale, or distribution of fireworks devices.

C. "Consent Decree" means the Consent Decree of Permanent Injunction entered by this Court on March 6, 1990.

## **II. CIVIL PENALTIES**

3. Plaintiff alleges that after March 6, 1990, Defendants have knowingly introduced or caused the introduction in interstate commerce of lots of fireworks devices that failed to comply with the Commission's Fireworks Regulations at 16 C.F.R. Part 1507 and 16 C.F.R. §§ 1500.14(b)(7) and 1500.17(a)(3), and are therefore banned hazardous substances pursuant to section 2(q)(1)(B) of the FHSA, 15 U.S.C. § 1261(q)(1)(B), in violation of section 4(a) of the FHSA, 15 U.S.C. § 1263(a).

4. Plaintiff alleges that on or about June 8, 2000, Defendants obtained information which reasonably supported the conclusion that the Hustler, a fireworks product with mortar tubes and shells, contained an unreasonable risk of serious injury or a defect which could create a substantial product hazard. Specifically, tubes included in the Hustler and used to fire mortar type shells could unravel during use. If that happened, explosive materials could escape out the side of the tube and injure the consumer firing the device. Defendants knowingly failed to report to the Commission such defect, risk, or death as required by sections 15(b)(2) and (3) of the CPSA, 15 U.S.C. §§ 2064(b)(2) and (3), in violation of section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4). Plaintiff does not know of any other instances where Defendants have failed to comply with the CPSA in the last five years.

5. Defendants deny each and all of the foregoing allegations, and specifically allege that they have in good faith attempted to comply with the Consent Decree's provisions and with

the requirements of the FHSA and CPSA. Defendants enter into this Modified Decree in order to avoid the expense, distraction, and uncertainty of litigation and to bring closure to this matter, without admitting to any wrongdoing.

6. In settlement of the allegations set forth above, David Collar, Winco Fireworks Inc., Winco Fireworks International, LLC and Winco Fireworks of Utah, LLC ("Collar/Winco") agree to pay a civil penalty in the total amount of six hundred thousand dollars (\$600,000), to be paid in equal installments of one hundred thousand dollars (\$100,000). Collar/Winco shall be jointly and severally liable for payment of the foregoing civil penalty amount. Within sixty (60) days of entry of this Modified Decree by the Court, the initial payment of \$100,000 shall be made by Collar/Winco in the form of a certified or cashier's check made payable to the Treasurer of the United States and sent by overnight delivery to the Director, Office of Consumer Litigation, Civil Division, 1331 Pennsylvania Avenue NW, Rm 950N, Washington, D.C. 20004. The cover letter accompanying the check shall include the title of this litigation and a reference to DJ# 104-29-26. The remaining installment payments of \$100,000 shall be made in the same form and to the same address on an annual basis thereafter (i.e., the second installment shall be paid one year from the date of the first payment, the third installment shall be paid two years from the date of the first payment, and so forth). Upon the failure of Collar/Winco to make a payment or upon Collar/Winco making a late payment (a) the entire amount of the civil penalty shall be due and payable, and (b) interest on the outstanding balance shall accrue and be paid at the federal legal rate of interest under the provisions of 28 U.S.C. §§ 1961(a) and (c).

### **III. INJUNCTIVE PROVISIONS**

7. Defendants and Related Persons are permanently restrained and enjoined under

15 U.S.C. §§ 1263(a), 1263(c), and 1267(a) from directly or indirectly introducing, delivering for introduction, or receiving and delivering or proffering for delivery in interstate commerce fireworks devices that are banned hazardous substances pursuant to the FHSA, 15 U.S.C. § 1261(q)(1)(B), and the regulations issued thereunder, 16 C.F.R. §§ 1500.17 (a)(3), (a)(8), and (a)(9) and 16 C.F.R. Part 1507 (hereafter “banning regulations”), or misbranded hazardous substances pursuant to the FHSA, 15 U.S.C. §§ 1261(p) and 1262(b), and the regulations issued thereunder, 16 C.F.R. § 1500.14(b)(7) and 16 C.F.R. § 1500.121 (hereafter “misbranding regulations”).

8. In addition to and in accordance with the preceding paragraph, the Defendants and Related Persons are permanently restrained and enjoined from directly or through their agents introducing, delivering for introduction, or receiving and delivering or proffering for delivery in interstate commerce, fireworks subject to the FHSA unless and until:

All fireworks devices imported by Defendants and Related Persons have been tested and certified as in compliance with the applicable U.S. laws and regulations by the American Fireworks Standards Laboratory (“AFSL”) or an independent third party that has been accepted by the Director, Office of Compliance, CPSC. Such testing shall be at Defendants’ and Related Persons’ expense. This Paragraph shall take effect for any order of fireworks devices placed by Defendants or Related Persons after the date this Decree is entered. Defendants and Related Persons shall maintain at a U.S. location(s) the actual test reports for each item imported for a period of six (6) years from the date of testing.

9. If Defendants and Related Persons do not use AFSL for testing and certification, then they shall submit the name and credentials of the independent third party they propose to

use (required by paragraph 8 of this Modified Decree) to the Director, Office of Compliance, CPSC, 4330 East West Highway, Bethesda, MD 20814, via overnight delivery and facsimile at 301-504-0359, no later than 60 days prior to using any subject third party. The Director, Office of Compliance shall have the right to object to the independent third party selected by Defendants and Related Persons, provided that such objection is supported by reasonable grounds. The Director must notify Defendants and Related Persons of an objection within thirty (30) calendar days of Defendants and Related Persons submitting the third party's name and credentials, at which point Defendants and Related Persons shall select another independent third party, the name and credentials of which shall be submitted to the Director, Office of Compliance. Alternatively, Defendants and Related Persons shall have the right to file a motion before this Court seeking review of such objection as unreasonable, and if this Court finds that the objection was not founded on reasonable grounds said objection shall be set aside. If the Director, Office of Compliance does not respond to Defendants' and Related Persons' submission of an independent third party's name and credentials within thirty (30) days, Defendants and Related Persons may use that independent third party to do the testing and certification required by paragraph 8 of this Modified Decree.

10. With respect to the introduction, delivery for introduction into interstate commerce or the receipt in interstate commerce of any fireworks products manufactured and/or assembled in the United States and/or its possessions and territories and not tested and certified under the foregoing paragraphs 8 or 9, Defendants and Related Persons shall, for a period of one year from the date they receive notice of the entry of this Modified Decree, send a notice to the Commission of sales of such products by sending to the Commission a copy of the invoice or

notice document prepared for the Commission containing similar information by (i) facsimile to Fireworks Program Manager at 301-504-0359, or (ii) overnight delivery service sent to Fireworks Program Manager, Office of Compliance, CPSC, 4330 East West Highway, Bethesda, MD 20814), or (iii) email to [JJoholske@cpsc.gov](mailto:JJoholske@cpsc.gov) or to an email address provided by the CPSC; within three days of shipment. For each product, the documentation sent to the Commission shall state: the type of fireworks devices (i.e., combination items; comets, mines and shells; firecrackers; fountains; ground spinners and chasers; specialty items; party, trick, and toy smoke devices; reloadable tube aerial shells; roman candles; sky rockets, missiles, and helicopters; hand-held sparkling devices; or wheels), the name and quantity of the products sold, and the identity and address of the recipient. Pricing and any other proprietary information may be deleted or redacted from the documents provided to the Commission.

11. Defendants and Related Persons shall notify the Commission by certified mail, return receipt requested, to Fireworks Program Manager, Office of Compliance CPSC, 4330 East West Highway, Bethesda, MD 20814 of any changes in the corporate structure of Defendants and Related Persons (such as dissolution, reorganization, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries) that may affect the compliance obligations arising out of this Modified Decree, and make reasonable efforts to give such notice as far in advance of such change as is practicable, but, in any event, not later than thirty (30) days before such change becomes final. The Defendants and Related Persons shall provide a copy of this Modified Decree to any successor or assign.

12. Defendants and Related Persons shall provide a copy of this Modified Decree to each officer, director, and supervisor of Defendants and Related Persons within thirty (30) days

of the date of entry of this Modified Decree, and provide both Fireworks Program Manager of the Commission and the Plaintiff's attorneys with an affidavit of compliance within thirty (30) days after the date of entry of this Modified Decree, stating the fact and manner of compliance with this paragraph and identifying the names and positions of all person so notified.

#### **IV. GENERAL PROVISIONS**

13. Commission investigators shall be authorized to make inspections of Defendants' and Related Persons' facilities to inspect the records required pursuant to this Modified Decree to ensure continuing compliance with the terms of this Modified Decree. Such inspections shall be authorized upon presentation of appropriate credentials and a written notice specifying that such inspection is being requested in accordance with this Modified Decree. Such inspection authority granted by this Modified Decree is apart from and in addition to the authority to make inspections under 15 U.S.C. §§1270 and 1271.

14. Defendants may petition this Court to rescind the provisions of this Modified Decree after a period of ten (10) years from the entry of this Modified Decree. If, in the Commission staff's judgment, Defendants and Related Persons have maintained a state of continuous compliance with this Modified Decree, Plaintiff will not oppose such petition.

15. This Court shall retain jurisdiction of this matter for the purpose of enabling any party to this Modified Decree to apply for any further orders that may be needed to construe, carry out, modify, or enforce compliance with the terms of this Modified Decree.

16. Each party shall bear its own costs and attorney's fees.

SO ORDERED:

Dated this 30 day of NOVEMBER, 2005.


  
UNITED STATES DISTRICT JUDGE

We hereby consent to the entry of the foregoing Modified Decree.

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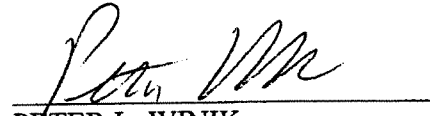
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